

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DARK CATT STUDIOS HOLDINGS, INC.,
a Delaware corporation, and DARK CATT
STUDIOS INTERACTIVE LLC, an Illinois
limited liability company, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

VALVE CORPORATION, a Washington
corporation,

Defendant.

Case No. 2:21-cv-00872-JCC

**DEFENDANT VALVE CORPORATION'S
MOTION TO DISMISS PLAINTIFFS'
CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF**

**NOTE ON MOTION CALENDAR:
September 24, 2021**

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1 **I. INTRODUCTION**

2 On June 23, 2021, Valve moved to compel the individual plaintiffs in *Wolfire Games,*
 3 *LLC, et al. v. Valve Corp.*, No. 2:21-cv-00563 (“*Wolfire*”), to arbitrate as agreed in the Steam
 4 Subscriber Agreement, and to stay the claims of Wolfire Games (“Wolfire”), the sole developer
 5 plaintiff, pending arbitration. *Wolfire* Dkt. # 35. Plaintiffs here, parent and subsidiary (“Dark
 6 Catt”), are a developer like Wolfire. If the Court stays Wolfire’s claims, Valve will move to stay
 7 Dark Catt’s as well. Alternatively, Valve moves under Fed. R. Civ. P. 12(b)(6) to dismiss Dark
 8 Catt’s Complaint (Dkt. # 1) because it does not state claims upon which relief can be granted
 9 under Section 2 of the Sherman Act or the Washington Consumer Protection Act (“CPA”).

10 Valve also moved to dismiss the *Wolfire* Complaint, *Wolfire* Dkt. # 37 (“*Wolfire* MTD”),
 11 which is much like Dark Catt’s. The main differences are: (1) developer Dark Catt is not joined
 12 by consumer plaintiffs; (2) Dark Catt does not advance a tying claim or propose two separate
 13 antitrust markets; and (3) Dark Catt adds to its Steam Keys claims two provisions in Valve’s
 14 contract with developers (one about game and update release timing, the other about add-on
 15 content), and says together they amount to an anticompetitive Most-Favored-Nations agreement.

16 Dark Catt’s Complaint fails to state a monopolization or CPA claim for two
 17 straightforward reasons like those set forth in Valve’s motion to dismiss the *Wolfire* Complaint.

18 First, just as in *Wolfire*, Dark Catt claims injury solely from paying Valve an allegedly
 19 supracompetitive 30% commission on games it sold to consumers on Steam. But it alleges no
 20 facts from which the Court could plausibly infer that Valve’s 30% commission (less for high-
 21 volume games) is above a competitive level. This alone dooms the Complaint. Valve, an
 22 innovator that created Steam in 2003 and shortly after 2004 began allowing other developers to
 23 sell their games on Steam, set the 30% rate at the very beginning. In fact, the 30% rate, chosen
 24 when Valve had zero market share and no power to charge anything other than a competitive
 25 rate, has remained the same (save volume discounts added in 2018), while Valve has allegedly
 26 faced “competitive pressures for almost twenty years” from “billion-dollar companies with

popular PC games.” ¶¶ 8, 67.¹ In this environment, Valve has continuously enhanced Steam with many new features prized by developers and gamers alike, meaning its quality-adjusted price has fallen steadily over that period. Competitive prices do not cause antitrust injury.

Second, just as in *Wolfire*, Dark Catt alleges that Valve has a 75% market share but pleads no factual support, which alone also justifies dismissal. In fact, the website the Complaint cites for the 75% allegation, and an article the website relies on for Valve’s sales, eviscerates the 75% assertion. “If the numbers are right, that means Valve own[s] at least 18% of their specific market” (the “dedicated PC digital game business”) “and likely far more than that once in-game purchases are accounted for.” ¶ 5 n.3 (cited article). That is nowhere near 75%. As in the recent *Facebook* decision, the lack of factual support for the market share allegation means the essential element of market power is insufficiently alleged. *See F.T.C. v. Facebook, Inc.*, 2021 WL 2643627, at *1, *13–14 (D.D.C. June 28, 2021).

While these two deficiencies independently warrant dismissal (just as in *Wolfire*), Dark Catt also fails to plausibly allege any unlawful conduct by Valve for three reasons:

First, Dark Catt fails to allege anything unlawful about Valve’s “Steam Keys” program. Steam Keys are code numbers that allow Steam-enabled games to be activated on Steam. Valve gives Steam Keys to developers *for free* as an accommodation. Developers can then sell them at retail stores or online to gamers, or give them to reviewers. The customer buys (or the reviewer receives) a Steam Key from the developer, logs into Steam, enters the code, and downloads and plays the game on Steam using Valve’s infrastructure just as if the game was purchased on Steam—all without anyone paying Valve anything. Dark Catt alleges Valve’s Steam Key guidelines violate the antitrust laws because they ask developers who want to take advantage of Steam’s features and popularity for free to treat Steam customers fairly by setting their prices for Steam-enabled games on Steam as low as they charge for those same Steam-enabled games when sold elsewhere using Steam Keys. Dark Catt, like *Wolfire*, says this request is

¹ Unless otherwise specified, paragraph references are to Dark Catt’s Complaint, Dkt. # 1.

1 anticompetitive. But Valve has no duty under antitrust law to allow developers to use free Steam
2 Keys to undersell prices for the games they sell on Steam—or to provide Steam Keys at all.

3 Dark Catt goes one step further and alleges that Steam Keys are “required” by the
4 industry and that Valve uses them to “punish behavior seen as contrary to its position ...
5 including ... speaking out.” ¶ 158. But, as to itself and others, the facts Dark Catt alleges and
6 documents it cites are either hollow or contradict its allegation, rendering this theory implausible.

7 Second, Dark Catt claims the Steam Key guidelines and two provisions in its contract
8 with developers somehow add up to a “Most Favored Nations (‘MFN’) provision preventing
9 price competition between storefronts.” ¶ 54. But Dark Catt misrepresents the provisions’
10 applicability and alleges no harm to competition from any of them. The Steam Key guidelines
11 ask developers who choose to use Steam Keys to give Steam customers the *lowest* available
12 price developers set for the game, and, contrary to Dark Catt’s assertions, do not apply to non-
13 Steam Key versions of the game a developer may choose to sell elsewhere. The two other terms
14 ask developers to keep their Steam games and downloadable content (“DLC”) up to date.
15 Seeking the best price and up-to-date products for your customers is not harm to competition; it
16 *is* competition. *See, e.g., Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*
17 *of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989) (upholding “Prudent Buyer” policy under which
18 insurer paid the lowest price physicians charged to any insurer). Thus, Dark Catt alleges no
19 plausible antitrust injury. Dark Catt also claims these terms prevent developers from offering
20 exclusive content or deals through other stores, but the facts it alleges show developers often
21 make exclusive deals with Valve’s “billion-dollar” competitors like Epic. ¶¶ 67, 164, 172, 176,
22 177. Finally, contrary to Dark Catt’s assertion, the DLC term specifically allows developers to
23 offer exclusive content through other distributors. None of the provisions is plausibly alleged to
24 be anticompetitive; collectively, they do not add up to an unlawful MFN.

25 Finally, Dark Catt claims that Valve harms competition by allowing Steam users to post
26 reviews of games they purchase and play. But that alleges no anticompetitive conduct. Rather,

1 it improperly invites the Court to become the arbiter of whether Valve and other online sellers
2 should allow customer reviews and, if so, what customers should be allowed to say.

3 **II. STATEMENT OF FACTS**

4 Valve started as a video game developer in 1996, and in 2003 launched Steam, a
5 pioneering online gaming platform to facilitate game updates and other enhancements gamers
6 value as they play. ¶ 3. A year later, it opened up Steam to third-party game developers. ¶ 4.
7 Those developers, not Valve, now produce the overwhelming majority of games customers buy
8 and play on Steam. ¶ 89 n.23 (cited Letter Brief at 5). Steam has been tremendously successful,
9 currently hosting over 50,000 games, with 120 million monthly active users. *See* ¶¶ 4, 6.

10 Valve has always made Steam available for free to play games. Like Wolfire, Dark Catt
11 disingenuously omits this fact, which the Court must glean from allegations of what Valve does
12 charge for: selling games on Steam. Developers set their own prices and discounts on Steam.
13 *See* ¶¶ 106, 195. Valve sells their games on Steam at these prices and sends developers the
14 revenue, less Valve's commission, sales tax, and refunds. ¶ 8. Thus, Valve earns revenue to pay
15 for Steam—for the servers and other infrastructure all over the world to enable players to access
16 their Steam accounts to buy and play games, for customer service agents, for employees who add
17 features to make it more popular with customers and developers, and other Steam expenses—by
18 charging a commission when game developers sell games to players on Steam. *See* ¶¶ 1–5.

19 In 2007, Steam hosted just 150 games. ¶ 4. But over time, Valve developed and
20 improved Steam's features, providing increased value to its developer partners and customers.
21 Steam includes a digital storefront offering state-of-the art content delivery, cybersecurity, and
22 digital rights management. *See* ¶ 117. Steam gives developers access to a large pool of potential
23 customers, ¶¶ 5, 20, 42, 110, 124, support in 26 languages with locally customizable store pages,
24 and Steam's sizable following in North America, Europe, and beyond, ¶¶ 105–07. The Steam
25 review system allows players to rate and comment on games, generating a game review score.
26 *See* ¶¶ 17, 178, 182–83. Customers trust and rely on that system—other stores now import, and

1 other systems look to, a game’s Steam score—such that games by even unknown developers
 2 garnering favorable reviews from Steam users can quickly generate large sales. *See* ¶¶ 18, 97,
 3 179, 181. Finally, Valve developed Steam Keys, an accommodation to developers to enable
 4 them to sell copies of their Steam-enabled games in brick-and-mortar stores or online, or give
 5 them away to beta test new games or generate media and influencer publicity before release.
 6 ¶¶ 12, 58, 125, 147–48. As explained below, Valve gives developers Steam Keys *for free*.

7 The industry did not stand by idly. As Dark Catt concedes, Valve has been facing
 8 “competitive pressures for almost twenty years,” ¶ 8, from rival platform-stores by Epic,
 9 Electronic Arts, Microsoft, Tiny Build, Discord, ¶ 21, and as Wolfire alleged, Amazon, *Wolfire*
 10 CAC ¶ 252. Valve competes with these platforms to offer developers’ games. When developers
 11 choose to sell their games on Steam and other platforms, Valve competes for gamers’ business
 12 with the non-Steam-enabled versions these platforms sell. And because Valve allows developers
 13 to resell their free Steam Keys without paying Valve anything, Steam faces competition from
 14 Steam Key resellers, who sell licenses for games users can then play on Steam. ¶¶ 41, 150–51.

15 Dark Catt, a developer, allegedly “created a PC game and made it compatible with
 16 Steam,” then “sold its game to consumers on Steam and paid ... Valve’s mandatory 30% revenue
 17 share on game sales on Steam.” ¶¶ 26–27. Unlike Wolfire and the seven individual plaintiffs in
 18 that case, Dark Catt here seeks to represent a class comprising only game developers. *See* ¶ 202.
 19 Also unlike Wolfire, Dart Catt does not argue that game sales and gaming platforms are separate
 20 products sold in separate markets. Rather, Dark Catt seeks to represent a class of developers that
 21 contracted with Valve to “distribute a PC game via Steam and sold such game on or after April
 22 27, 2017.” *Id.* Since it alleges the single market that Steam serves, Dark Catt omits the tying
 23 claims Wolfire asserted. Thus, Dark Catt’s Complaint turns on whether it has plausibly alleged
 24 that Valve, amidst “competitive pressures for almost twenty years,” ¶ 8, from “billion-dollar
 25 companies with popular PC games,” ¶ 67, and “[i]ndustry behemoths,” ¶ 119, has somehow
 26 “crossed the line into illegal monopolization,” comparing it to Microsoft in the late 1990s, ¶ 23.

The sole alleged harm for which Dark Catt seeks damages, for itself and its proposed class, is paying “a supracompetitive revenue share to Valve” for sales of its games on Steam. ¶¶ 220, 221, 230, 231, 238, 239. Like Wolfire, Dark Catt concludes, without alleging facts that could plausibly support its conclusion, that Valve’s commission is above what “would be offered in a competitive market.” ¶ 114. As detailed below, the facts alleged establish the opposite.

III. ARGUMENT

A. Legal Standard

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* (quotation marks omitted). “Applying this standard is a context-specific task that requires drawing on judicial experience and common sense.” *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018) (quotation marks omitted).

This is especially true in antitrust cases. “[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation omitted). Consequently, “the federal courts have been reasonably aggressive in weeding out meritless antitrust claims at the pleading stage.” *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 543 (8th Cir. 2015) (quotation marks omitted).

B. Dark Catt Fails to Allege Antitrust Injury.²

1. Dark Catt must plausibly allege antitrust injury.

All private antitrust claims require antitrust injury, *Rebel Oil Co., Inc. v. Atl. Richfield*

² This section closely tracks Part III.D of the *Wolfire* MTD and for substantially similar reasons provides a basis to dismiss the Complaint independent of the allegedly unlawful conduct.

Co., 51 F.3d 1421, 1433 (9th Cir. 1995), and a plaintiff who fails to adequately plead antitrust injury lacks standing, *Somers v. Apple, Inc.*, 729 F.3d 953, 964 n.5 (9th Cir. 2013); *see also In re NCAA I-A Walk-On Football Players Litig.*, 2006 WL 1207915, at *14 (W.D. Wash. May 3, 2006) (“Plaintiffs can obtain no remedy without proving antitrust injury.”) (Coughenour, J.).

2. **Dark Catt predicates its alleged injury on Valve’s commission being supracompetitive.**

Just as in *Wolfire*, the alleged injury to Dark Catt and the proposed class is based entirely on the commission Valve receives on Steam’s third-party sales (also termed Valve’s “revenue share” or fee). ¶¶ 2, 220–21, 230–31, 238–39. That injury must flow from aspects of Valve’s conduct that harm competition, *see Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (“If the injury flows from aspects of the defendant’s conduct that are beneficial or neutral to competition, there is no antitrust injury.”), so Dark Catt alleges (just as the *Wolfire* Plaintiffs) that Valve’s commission is “supracompetitive,” *e.g.*, ¶¶ 20, 22, 75, 200.

“Claiming that prices are supra-competitive is a legal conclusion rather than a fact, however, and must be supported by specific factual allegations.” *Bio-Rad Labs., Inc. v. 10X Genomics, Inc.*, 483 F. Supp. 3d 38, 59 (D. Mass. 2020). Thus, Dark Catt must allege facts supporting an inference that Valve’s commission is supracompetitive. *See Intel Corp. v. Fortress Inv. Grp. LLC*, 511 F. Supp. 3d 1006, 1027–29 (N.D. Cal. 2021) (dismissing antitrust claims where allegations “arguably suggest that supracompetitive pricing is possible; however, *Twombly* and *Iqbal* require plausibility and not just possibility”); *Top Rank, Inc. v. Haymon*, 2015 WL 9948936, at *8–9 (C.D. Cal. Oct. 16, 2015) (same where plaintiff “fail[ed] to allege any evidentiary facts plausibly suggesting [...] supracompetitive prices”).

3. **Dark Catt’s allegations of supracompetitive pricing are implausible.**

Dark Catt claims that Valve uses its alleged “monopoly tactics” to charge a supra-competitive commission. ¶ 8. That commission is 30% for most developers, with volume discounts added in October 2018 for high-selling games. ¶¶ 191–92. And just as in *Wolfire*, Dark Catt crucially alleges that Valve has maintained the same 30% commission “for almost

twenty years.” *See* ¶ 8 (“Valve has not been forced to lower [its 30% tax] through competitive pressures for almost twenty years.”).

Steam launched in 2003 and began selling third-party games soon after the release of its popular game, *Half-Life 2*, in November 2004. ¶¶ 3–4. Valve is allegedly now “the world’s largest distributor of PC games.” ¶ 5. The Complaint does not allege precisely when Valve assumed its purportedly dominant position, *see* ¶ 110 (“Since it was launched in 2003, Steam has become the dominant distributor of PC games.”), but the only reasonable inference based on its factual allegations is that it took at least five and likely several more years, *see* ¶ 6 (“Valve’s success as a company has largely tracked the growth of Steam. In 2005, *Forbes* estimated that Valve had grossed \$70 million. As of 2012, the company was worth over \$3 billion.”). This means Valve allegedly charged the same 30% for *at least five years* before becoming dominant, beginning when it was a “plucky gaming upstart” with “business acumen,” ¶ 7, and had zero market share (apart from selling its own games). These factual allegations make it implausible that 30% is supracompetitive and that Valve can charge it only because of its alleged dominance.

Other factual allegations render Dark Catt’s theory even less plausible. Valve has not raised its 30% commission in nearly two decades, during which it went from zero to an alleged 75% market share, *e.g.*, ¶ 5, and the industry saw substantial growth in both output and demand, *see* ¶ 4 (games on Steam went from 150 in 2007 to now over 50,000), ¶ 6 (Valve worth over \$3 billion in 2021, \$10 billion in 2019). And the alleged facts establish that over time Valve has enhanced Steam with many features prized by developers and gamers alike, meaning its quality-adjusted commission rate has actually fallen over this period. *See* Part II, *supra*. While “in a concentrated market, the occurrence of a price *increase* does not in itself permit a rational inference of [...] supracompetitive pricing,” *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) (emphasis added), Dark Catt fails to allege an increase for nearly twenty years. In fact, the only price change alleged is a *decrease* of up to 33% for high-volume games. *See* ¶ 191 (30% to 20%). None of this permits a rational inference that Valve’s

1 commission is supracompetitive.

2 Moreover (and contradicting its conclusory allegations to the contrary), the Complaint
3 factually alleges that Valve has faced substantial competition from “billion-dollar companies
4 with popular PC games,” ¶ 67, “more efficient business models and [...] more favorable
5 opportunities for Developers,” ¶ 21, including (1) a nine-year campaign by “[i]ndustry
6 behemoth[]” Electronic Arts (“EA”), leveraging “popular franchises,” ¶¶ 68, 119; (2) an ongoing
7 campaign by Microsoft, leveraging not only its “popular games and Windows operating system,”
8 but also its Xbox console, ¶¶ 69, 79, 81, 96, 193; (3) a rival storefront by Ubisoft launched in
9 2009 and leveraging its “blockbuster franchises,” ¶ 70; (4) an entry by popular communications
10 service Discord in late 2018 (the same time Valve implemented its volume discounts, *see* ¶ 113),
11 leveraging its “existing user base of millions of active PC gamers and [...] more favorable terms
12 for developers,” ¶ 71; (5) Epic’s store, launched with the “highly popular Fortnite game” and
13 spending hundreds of millions of dollars to attract developers and customers, ¶¶ 64–65; and (6)
14 Amazon, *Wolfire* CAC ¶¶ 20, 231, 252. These facts make it implausible that the 30% (or less
15 with volume discounts) Valve charged throughout nearly twenty years of intense competition is
16 supracompetitive.

17 The Ninth Circuit ruled on this very issue under indistinguishable facts. *Somers v. Apple,*
18 *Inc.*, 729 F.3d 953 (9th Cir. 2013). Somers brought antitrust claims based on Apple’s purported
19 monopoly of digital music sales. *Id.* at 956. Under her “overcharge theory,” Somers alleged that
20 Apple was able to charge supracompetitive prices for digital music by thwarting competitors
21 with its anticompetitive conduct. *Id.* at 964. But the Ninth Circuit affirmed dismissal of Somers’
22 overcharge claims because the market facts rendered her overcharge theory implausible. *Id.* at
23 964–66. Apple had allegedly charged the same price (99 cents per song) since it entered the
24 market—both before and after it obtained a monopoly—and never changed that price, even after
25 a large seller (Amazon) entered the market. *Id.* at 964. These alleged market facts rendered
26 implausible Somers’ overcharge theory, warranting dismissal of her antitrust claims. *Id.*

1 Just as in *Somers*, Dark Catt’s theory of harm is that Valve would be forced to lower its
 2 commission but for its dominance and anticompetitive conduct. *See* ¶¶ 8, 216. And Dark Catt’s
 3 market allegations, detailed above, are actually weaker than those in *Somers*. *Compare Somers*,
 4 729 F.3d at 964 (alleging Apple had always charged the same price, including for one year
 5 before obtaining a monopoly) *with* ¶¶ 6, 8, 43 (alleging Valve has charged the same price for
 6 almost twenty years, including for many years before becoming dominant, and added volume
 7 discounts in 2018). Dark Catt’s factual allegations render implausible its claim that Valve’s
 8 commission is supracompetitive, warranting dismissal. *Somers*, 729 F.3d at 964; *see also Abbott*
 9 *Labs. v. Adelphia Supply USA*, 2017 WL 5992355, at *7 (E.D.N.Y. Aug. 10, 2017) (dismissing
 10 antitrust claims because allegations that price had stayed the same before and after competitor
 11 exclusion rendered implausible theory that unlawful conduct affected price).

12 4. **Other allegations do not cure the implausible supracompetitive price.**

13 Dark Catt may try to sidestep *Somers* with other allegations, but they don’t save the
 14 Complaint. First, it may argue that some competitors charge less than Valve, *e.g.*, ¶ 193, making
 15 it plausible that Valve’s rate is supracompetitive. The Ninth Circuit rejected that argument in
 16 *Somers*. 729 F.3d at 965–66 (“[S]uch variations in pricing exist even in competitive markets.”).
 17 Here, Dark Catt admits the market regards Steam as superior, ¶ 68 (“[Steam is] where the
 18 players are”); ¶ 176 (describing gamer backlash when publisher 2K/Take Two did not release
 19 *Borderlands 3* on Steam), which is consistent with Valve’s ability to fairly command allegedly
 20 higher prices, *see Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005)
 21 (“Competitive markets are characterized by both price and quality competition, and a firm’s
 22 comparatively high price may simply reflect a superior product.”); *Blue Cross & Blue Shield*
 23 *United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (“Generally you
 24 must pay more for higher quality.”). Moreover, 28% of Steam-enabled game sales are allegedly
 25 made via Steam Keys by third-party resellers. *See* ¶ 150. Since developers pay Valve no
 26 commission for games sold via free Steam Keys, those sales (as well as the volume-discount

1 rates of 25% and 20%) drop Valve’s effective commission well below 30%.

2 Second, Dark Catt may point to its allegation that Valve’s commission “would be forced
3 down by competitive market pressure.” ¶ 195. Not only does that conclusion ignore the wealth
4 of competitive pressures factually alleged, *see* Part III.B.3, *supra*, but it ignores a host of other
5 factors, including Steam’s quality and the price-increasing effect of rising demand. *See*
6 *Metronet Servs. Corp. v. Qwest Corp.*, 2001 WL 765167, at *6 n.4 (W.D. Wash. Apr. 16, 2001)
7 (Coughenour, J.) (“According to standard price theory, prices increase as output decreases and
8 demand rises.”). Dark Catt alleges just that for PC game digital distribution, ¶ 87 (“PC games
9 moved to digital distribution earlier than console games, which still have a significant physical
10 distribution component.”), and for Steam, ¶ 110 (Steam has grown since 2003 to more than a
11 billion user accounts). The Complaint also alleges an evolving gaming landscape, *e.g.*, ¶ 7
12 (“[Valve made the] early development of a digital distribution system that can support third-
13 party applications.”), particularly ill-suited to inferences from simplified theories. *See F.T.C. v.*
14 *Qualcomm Inc.*, 969 F.3d 974, 1003 (9th Cir. 2020) (“We decline to ascribe antitrust liability in
15 these dynamic and rapidly changing technology markets without clearer proof of anticompetitive
16 effect.”). Alleging a supracompetitive price requires facts, not vague predictions.

17 The fallacy in Dark Catt’s logic is demonstrated by its example, where a hypothetical
18 developer selling on both Steam and a lower commission store could earn more money while
19 charging the customer less on the latter, leading to increased sales and revenue. ¶ 196. But Dark
20 Catt alleges numerous examples of developers taking advantage of just such lower commission
21 stores, and thus reaping all of the benefits—and applying all of the “competitive pressure”—
22 alleged, none of which depends on concurrently selling on Steam. *See* ¶¶ 164, 172, 176, 177.³

23 Finally, Dark Catt alleges that the volume discounts Valve added in 2018 are “an
24 admission that the 30% rate was supracompetitive.” ¶ 114. But volume discounts are a means of
25

26 ³ For single-player games like Metro Exodus, Dark Catt alleges there is no advantage to
selling on Steam. *See* ¶ 175. And while some lower commission stores may not be options for
some developers, those alleged limitations are imposed by those stores, not by Valve. *See* ¶ 123.

price competition which “often reflect cost savings.” *LePage’s Inc. v. 3M*, 324 F.3d 141, 154 (3d Cir. 2003). Thus, Dark Catt seeks to establish antitrust injury with evidence of price competition. “The antitrust laws require no such perverse result, for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (cleaned up). Dark Catt has alleged no plausible basis for making that conclusion, or its unsupported follow-up conclusion that even those volume discounts “remain[] supracompetitive.” ¶ 114.

5. **Dark Catt’s alleged non-price antitrust injuries are also implausible.**

Alternatively, Dark Catt may attempt to shift the inquiry to its various allegations of non-price injury. *E.g.*, ¶ 135 (“suppresses quantity and quality”). But those alleged injuries would mostly harm consumers, not Dark Catt (or the proposed class), *see* ¶ 22 (“Valve’s practices have also harmed [...] consumers, who are now inured to Steam, paying supracompetitive prices [...] and/or being denied the benefits of the higher quality, higher quantity, and/or cheaper games and more innovative delivery systems.”); *see also* ¶¶ 49, 201, and so do not plead antitrust injury to Dark Catt. Antitrust injury requires “an injury to the plaintiff.” *Somers*, 729 F.3d at 963.

The few non-price harms alleged to affect developers are just other ways of saying they lost out on sales. *See* ¶ 11 (“greater exposure,” “more money”); ¶ 75 (“better marketing support”). And Dark Catt’s allegations of harm by lost game sales are either premised on Valve’s legitimate regulation of its free Steam Key accommodation, *see* ¶¶ 14, 144 (which as discussed in Part III.D.1, *supra*, is not cognizable under the antitrust laws) or inextricably linked to Valve’s revenue sharing being supracompetitive, *see* ¶¶ 75, 133, 195–96. And predicated that harm on the notion that Valve’s commission is supracompetitive impermissibly “piles speculation atop speculation.” *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1364 (D.C. Cir. 2012) (vacating judgment for lack of standing based on speculative injury). The remaining alleged non-price harm to developers is rendered implausible by contradictory factual allegations. *Compare* ¶ 11 (harm in lack of developer choice) *with* ¶¶ 63–71 (detailing numerous rival

platforms for developers to choose).

Moreover, conspicuously absent from the Complaint are any alleged *facts* of reduced output, quality, innovation, or choice, making Dark Catt’s allegations of non-price harms conclusory. *See Power Analytics Corp. v. Operation Tech., Inc.*, 820 F. App’x 1005, 1019–20 (Fed. Cir. 2020) (rejecting as conclusory allegations of reduced output, stifled innovation, and customer choice and accordingly dismissing antitrust claims for failure to plead antitrust injury). And tellingly, the facts that are alleged show an *increase* in these non-price metrics. *See* ¶ 4 (games available on Steam increased from 150 in 2007 to more than 50,000 in 2021); ¶¶ 63–71 (numerous new platforms launched). Dark Catt even gives examples of developers choosing other platforms over Steam for their revenue-sharing terms. ¶¶ 164, 165, 172, 176.

In sum, Dark Catt stakes all its claims on its conclusion that Valve’s commission is supracompetitive, *see* ¶¶ 220–21, 230–31, 238–39 (sole allegations of injury/harm to Dark Catt and proposed class members in all three counts is paying “a supracompetitive revenue share”), but its factual allegations render that conclusion implausible. *Somers*, 729 F.3d at 964–67. Dark Catt thus fails to allege antitrust injury, *id.* at 967, lacks standing, *id.* at 964 n.5, and has no basis for damages, *id.* at 965, warranting dismissal of all claims on this basis alone.

C. Dark Catt Fails to Allege a 75% Market Share or Market Power.

Like the *Wolfire* Plaintiffs, Dark Catt alleges that Valve has 75% of the relevant market it calls “PC game distribution.” ¶¶ 5, 7. It then alleges this gives Valve market or monopoly power, supposedly enabling it “to profitably maintain the prices offered on Steam at supracompetitive levels without losing sales to other stores that offer the same games[, and ...] to exclude potential competitors from the PC game distribution market, harming Developers and potentially PC gaming customers.” ¶ 78. But Dark Catt’s 75% share allegations are no better than the *Wolfire* Plaintiffs’ (*see Wolfire* MTD at 14). The Court should reject them here as well.

The Complaint’s only “support” for the allegation that Valve has a 75% market share, and hence market power, is a citation to a third-party article in footnote 3. *See* Arthur

1 Zuckerman, [75 Steam Statistics](#) (cited at ¶ 5 n.3, visited Aug. 30, 2021). That article includes a
 2 line saying “Steam is the world’s largest distributor of PC games, taking up 75% of the global
 3 market share.” *Id.* That’s it; the article contains no source, analysis, or data for its 75% figure.

4 Not only that, but that article also makes the apparently contradictory assertion that,
 5 “Steam already accounts for more than 18% of PC game sales worldwide without taking in-game
 6 purchases into account.” *Id.* A closer look at its cited source reconciles the discrepancy and
 7 further explains why the 75% figure has no support. In the same paragraph where Dark Catt first
 8 makes the 75% allegation, it alleges, “In 2017, Steam generated over \$4 billion worth of sales.”
 9 ¶ 5. That is where Dark Catt cites the *75 Steam Statistics* article, ¶ 5 n.3, and when one looks to
 10 the sources that website lists, one sees that the author drew “over \$4 billion worth of sales” from
 11 an article entitled “[With \\$4.3 billion in sales, 2017 was Steam’s biggest year yet](#)” (cited as note
 12 20 in *75 Steam Statistics*, visited Aug. 30, 2021). When the latter article places Valve’s asserted
 13 \$4.3 billion sales in context, it eviscerates Plaintiffs’ 75% allegation. First, it accepts the \$4.3
 14 billion in sales from some unnamed source: “The \$4.3 billion number is an estimate, but it’s
 15 likely the most accurate one we’re going to get, and it doesn’t include revenue generated by DLC
 16 [downloadable content] or microtransactions.” *Id.* Second, far from supporting a 75% market
 17 share, the article all but denies it: “If the numbers are right, *that means Valve own[s] at least*
 18 *18% of their specific market*” (the “dedicated digital PC game business”), “and likely far more
 19 than that once in-game purchases are accounted for.” *Id.* (emphasis added).

20 Thus on an apples-to-apples basis—*i.e.*, comparing game sales without DLC and
 21 microtransactions—the article on which Dark Catt’s 75% allegation rests concluded that Steam
 22 had “at least 18%” of the market. That is a long way from 75% and well under any threshold for
 23 market power. In *F.T.C. v. Facebook, Inc.*, 2021 WL 2643627, at *1 (D.D.C. June 28, 2021), the
 24 court dismissed the FTC’s antitrust complaint because “the FTC’s inability to offer any
 25 indication of the metric(s) or method(s) it used to calculate Facebook’s market share renders its
 26 vague ‘60%-plus’ assertion too speculative and conclusory to go forward.” Dark Catt’s

1 allegation of a 75% market share is even worse because the source Dark Catt relies on
 2 contradicts its allegations. Like the *Wolfire* Plaintiffs, Dark Catt has failed to plausibly allege
 3 market power under *Facebook*, and the Court should dismiss the Complaint for that reason alone.

4 **D. Valve's Steam Key Guidelines and Two Provisions Dark Catt Cites in**
Valve's Developer Contracts Do Not Combine into an Anticompetitive MFN.

5 **1. Dark Catt Fails to Allege Valve's Free Steam Keys Injure Competition.**

6 As in *Wolfire*, Dark Catt alleges that Valve's Steam Keys program helps Valve maintain
 7 "monopoly power" in PC game distribution. ¶ 222. But Dark Catt never mentions that Valve
 8 doesn't charge developers for Steam Keys, and *receives no revenue* when a developer sells a
 9 Steam-enabled game through a brick-and-mortar or online store or gives one away for free.

10 Valve showed in the *Wolfire* MTD that it had no legal obligation to establish or continue
 11 the Steam Keys program, let alone voluntarily forego all revenue from it. Nor must Valve let
 12 developers free-ride on its investment in creating and maintaining Steam. Rather, as Valve's
 13 "Steamworks" documentation (the "[Steam Key guidelines](#)")—which Dark Catt quotes and cites,
 14 *see* ¶ 59 & n.12—states, "Steam keys are meant to be a convenient tool for game developers to
 15 sell their game on other stores and at retail. *Steam keys are free* and can be activated by
 16 customers on Steam to grant a license to a product." (visited Aug. 30, 2021) (emphasis added).
 17 Steam Keys give gamers the same experience as if they purchased a game on Steam. Valve is
 18 justifiably concerned about abuse of Steam Keys, whereby competitors (or fraudsters, *see* ¶ 151)
 19 obtain free Steam Keys to use to Valve's disadvantage.⁴

20 Dark Catt's allegations of anticompetitive conduct are no more plausible than *Wolfire's*,
 21 and in fact reinforce Valve's response that *Wolfire*, and now Dark Catt, seeks to enjoy the
 22 benefits of Steam Keys without adhering to Valve's guidelines for Steam Keys sales—sales on
 23 which the developer pays no commission to Valve yet enable the developers' customers to enjoy
 24 every feature of Steam. Dark Catt makes several serious-sounding allegations about Valve's

25 ⁴ "Valve provides the same free bandwidth and services to customers activating a Steam
 26 key that it provides to customers buying a license on Steam. We ask you to treat Steam cus-
 tomers no worse than customers buying Steam keys outside of Steam. While there is no fee to
 generate keys on Steam, we ask that partners use the service judiciously." Steam Key guidelines.

1 alleged anticompetitive use of the Steam Keys program, but, as with *Wolfire*, fails to allege facts
2 that show anything abusive or that Valve had any obligation to provide Steam Keys at all:

3 As the Supreme Court has repeatedly emphasized, there is no duty to deal
4 under the terms and conditions preferred by a competitor's rivals.
5 Likewise, the Sherman Act does not restrict the long recognized right of a
6 trader or manufacturer engaged in an entirely private business, freely to
exercise his own independent discretion as to parties with whom he will
deal. This is because the antitrust laws, including the Sherman Act, were
enacted for the protection of *competition*, not *competitors*.

7 *Qualcomm Inc.*, 969 F.3d at 993 (cleaned up, emphases in original); *see also Olympia Equip.*
8 *Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375–76 (7th Cir. 1986) (Posner, J.) (“[A] firm
9 with lawful monopoly power has no general duty to help its competitors, whether by holding a
10 price umbrella over their heads or by otherwise pulling its competitive punches” [...] “to reduce
11 its prices in order to help consumers, [or ...] to extend a helping hand to new entrants.”).

12 Dark Catt alleges that Steam Keys are “the industry standard for distributing authorized,
13 licensed copies of games.” ¶ 13. That is a very peculiar allegation, since Steam Keys have
14 nothing to do with non-Steam enabled versions of games that Epic, Microsoft, and others sell.
15 *See* ¶ 41. In addition, Steam Keys allegedly represent only 28% of Steam-enabled versions.
16 ¶ 150. Combined with Dark Catt’s allegation that distribution of Steam-enabled games is
17 dominated by sales on Steam (which do not rely on Steam Keys), *see* ¶ 154, most distribution
18 does not even allegedly conform to the supposed “industry standard.” Thus, Dark Catt’s
19 allegation that Steam Keys are an “industry standard” is implausible on its face.

20 Dark Catt goes on to allege that “[a]s the industry standard, PC distributors and
21 publishers require Steam keys to evaluate a game for possible funding, marketing support, or
22 distribution, and industry media require Developers to provide Steam keys to trial games.”
23 ¶ 157. But the fact that Valve makes them available for these purposes for free, subject to the
24 Steam Key guidelines, does not enable Dark Catt to declare them an “industry standard” and ask
25 the Court to nullify the guidelines. And the Steam Keys guidelines make clear Steam Keys are
26 not required; some of the media can access free copies through the “Curator Connect” program:

When you are nearing release and want to get a copy of your game in the hands of reviewers, press, influencers, streamers, or other individuals that can help bring awareness of your game and amplify your efforts, you can do so directly in Steam. *Many of the popular streamers, journalists, and community gaming sites are set up as Curators in Steam, and you can use Curator Connect to send them a copy of your game without having to email out keys.* These influencers can post their reviews on Steam or wherever else they already post reviews or stream your game.

<https://partner.steamgames.com/doc/marketing/tools> (emphasis added) (visited Aug. 30, 2021).⁵

The Complaint is devoid of *facts* that anyone evaluating a pre-release copy of a game “required” the copy to be provided via Steam Keys, let alone was “punished” by a denial of a Steam Key.⁶

Continuing in this vein, Dark Catt alleges that Valve “victimized” developer Ys Net because after Ys Net “anticipated being able to provide a Steam key at release to backers who wanted a PC version of” its *Shenmue 3* game, “Valve would not authorize Steam keys for Ys Net to provide its backers as anticipated.” ¶¶ 163–64. But Dark Catt’s account gives the lie to its story: Ys Net and its publisher announced that when released, *Shenmue 3* would be exclusively available *for one year on Epic Games Store—a Steam competitor.* ¶ 164. Ys Net “created a Steam page well in advance to generate user interest” in a game it decided to sell exclusively for a year on the Epic Games Store where Valve would not realize a cent. *Id.* And Ys Net expected (“anticipated” in Dark Catt’s mild-sounding formulation) that Valve would make Steam Keys available for free to its Kickstarter investors so they could play it on Steam upon release, again without Valve receiving a cent. *Id.* The antitrust laws do not require Valve to pay for such blatant free-riding, and it’s hard to imagine a better example of Valve taking a reasonable step to deter a developer from abusing Steam Keys to Valve’s detriment. “As the Supreme Court has repeatedly emphasized, there is ‘no duty to deal under the terms and conditions preferred by [a competitor’s] rivals’” *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 836 F.3d 1171, 1184 (9th

⁵ From the Steamworks Documentation, which Dark Catt cites and quotes at ¶ 59 & n.12.

⁶ Dark Catt alleges in the sketchiest of terms that “Valve substantially delayed granting Dark Catt’s request for Steam keys it planned to sell on Humble Bundle.” ¶ 160. This is not an example of supposed “industry standard” pre-release distribution for evaluation by the press, etc., and in any event, Dark Catt fails to allege it sustained any injury from this delay in granting its request for Steam Keys.

1 Cir. 2016) (quoting *Pac. Bell Tel. Co. v. linkLine Comm., Inc.*, 555 U.S. 438, 457 (2009)).⁷

2 Nor does the Complaint plausibly allege anticompetitive conduct or retaliation when
 3 Valve allegedly “delayed approving additional Steam keys” for a developer promoting its game
 4 “on other sites.” ¶ 165. To begin, the documents Dark Catt cites in footnote 36 contain nothing
 5 to support its conclusory “retaliation” allegation.⁸ And those documents show what Dark Catt is
 6 really after: that developers get as many Steam Keys as they want so they can free-ride on
 7 Valve’s creation and maintenance of Steam without limit. The [press release](#) (cited at ¶ 165 n.36,
 8 visited Aug. 30, 2021) reports the free promotion of *Ark: Survival Evolved* on Epic (the “other
 9 site[],” ¶ 165) was set for June 11 to 18, 2020, but the first comment in the [Steam Community](#)
 10 [Discussion](#) (cited at ¶ 165 n.36, visited Aug. 30, 2021) about the game’s unavailability from
 11 Humble Bundle, allegedly due to Valve not providing enough Steam Keys, was three months
 12 later, on September 9, 2020. Far from containing anything about retaliation, the entire tenor of
 13 that discussing and a cited [Facebook post](#) (cited at ¶ 165 n.36, visited Aug. 17, 2021 (Facebook
 14 account may be needed)) is just that Humble Bundle got far too many orders when it put *Ark* on
 15 sale at \$9.99—understandable since the prevailing retail price was \$35. That led to the game
 16 publisher, Studio Weekend, being unable to supply enough Steam Keys to meet the big demand
 17 at the rock-bottom price. Valve has legitimate concerns over runaway usage of its free Steam
 18 Keys program to the detriment of purchases on Steam, and it is entitled to limit the availability of
 19 Steam Keys to deter free-riding on its investment in Steam. The antitrust laws don’t require
 20 Valve to subsidize cut-rate pricing. Dark Catt’s allegations about *Ark* do not state a claim.

21 Finally, there is nothing retaliatory in a so-called purge of games for abuse of the
 22 Steamworks tools that, if too broad, was, as Dark Catt admits, “soon” corrected. ¶¶ 166–67.

23 ⁷ See also *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1184 (N.D. Cal.
 24 2012) (“[A defendant] has no duty to license its technology to foster competition or to give away
 its technology for others to clone.”).

25 ⁸ The Court may consider the documents Dark Catt cites over its conclusory allegations.
 26 See *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir. 2015) (Court
 may “consider documents whose contents are alleged in a complaint and whose authenticity no
 party questions, but which are not physically attached to the plaintiff’s pleading.” (cleaned up)).

Valve showed in the *Wolfire* motion to dismiss that it has no duty to give away free Steam Keys and may ask developers who receive them to follow the Steam Key guidelines. Dark Catt alleges examples of the very free riding these guidelines are meant to prevent. Calling Steam Keys an “industry standard” converts none of Valve’s conduct into antitrust injury.

2. **Dark Catt’s Allegations of Non-Steam Keys Contractual Provisions with Developers Also Fail to Allege Injury to Competition.**

Dark Catt claims Valve’s Steam Key guidelines and a pair of non-Steam Key contractual terms with game developers create an anticompetitive MFN. *See* ¶¶ 54–55, 62, 128. They don’t.

Dark Catt alleges three provisions together add up to an anticompetitive MFN: (1) the Steam Key guidelines, quoted at ¶ 59; (2) the “Delivery” provision in the Software Development Agreement (“SDA”) “requiring Developers [if they decide to sell on Steam] to make their games (and any updated version) available on Steam at the same time they become commercially available through any other source,” ¶ 46; and (3) the “DLC” (downloadable content) provision “requir[ing] Developers to offer their DLC [additional content for games] to Steam customers at the best price and earliest availability for which it is available on any other marketplace,” ¶ 53.

As Dark Catt admits, most-favored-nations clauses can foster competition. ¶ 129. Seeking the best price for your customers can be the essence of competition. *See, e.g., Ocean State Physicians Health Plan, Inc.*, 883 F.2d at 1113 (upholding plan paying the lowest price physicians charged any insurer). But in claiming these guidelines and contractual terms create an anticompetitive MFN, the Complaint misrepresents what they do and fails to allege facts from which the Court could plausibly infer harm to competition.

a. Steam Key Guidelines. Falsely claiming that Steam Keys guidelines reach beyond Steam-enabled games to non-Steam versions sold on other platforms, Dark Catt quotes a tweet from Tim Sweeney, CEO of Steam competitor, Epic (*see* ¶¶ 63–65), asserting that “Valve can simply say ‘no’” if a “developer wishes to sell their game for a lower price on Epic Games store than Steam.” ¶ 61. But the Steam Keys guidelines, which require developers to offer Steam customers as good a price for their game on Steam as they charge elsewhere *for the same Steam-*

1 *enabled game sold via Steam Keys*, have nothing to do with the price developers charge for
 2 games enabled for the Epic Games Store, as they do not rely on Steam Keys. *See* Part III.D.1,
 3 *supra*. Mr. Sweeney’s tweet is not a factual allegation that Valve can “say ‘no’” to prices on
 4 Epic; indeed, one of his Twitter followers corrected his “disingenuous” assertion: “That clause
 5 only applies to steam KEYS sold elsewhere, not to something like a game being sold at the Epic
 6 store.” *See* [Tim Sweeney tweet](#), reply of Roberto Bruno (@IlTurco) of Jan. 31, 2019 (emphasis
 7 added) (cited at ¶ 61 n.13, viewed on Aug. 30, 2021). No harm to competition is alleged.

8 *b. The Delivery Provision.* This provision governs timing of releases if developers
 9 decide to sell a game on Steam. If so, they agree to release it (and later updates, if any) on Steam
 10 at the same time they release the game elsewhere. ¶¶ 46, 137; *see also* SDA § 2.1, Ex. A to
 11 Declaration of Karl Quackenbush (filed concurrently). It requires developers to keep their Steam
 12 versions up to date; otherwise Valve could wind up selling outdated goods, an obvious customer-
 13 service issue. Dark Catt alleges that it “prohibits Developers from entering exclusive offerings
 14 with other storefronts,” which “suppresses competition by ensuring Steam has access to the
 15 newest inventory, on its terms, instead of having to negotiate for the newest releases in a
 16 competitive market.” ¶ 47. But the assertions that it prohibits exclusive deals with competitors
 17 and “suppresses competition” rest on no facts; indeed, they contradict the facts alleged.

18 First, the Complaint alleges numerous instances of developers entering into exclusive
 19 offerings with other stores, as they are free to do. *See* ¶ 164 (Shenmue 3 initially released
 20 exclusively on Epic), ¶ 172 (same for Metro Exodus), ¶ 176 (Borderlands 3), ¶ 177 (Ooblets);
 21 *see also* ¶ 64 (Epic “committing \$444 million to exclusivity deals in 2020”), ¶ 140 (“Epic Games
 22 Store solicits timed exclusives from Developers.”), ¶ 186 (Unfold Games refused offer from Epic
 23 for one-year exclusive, as owner “did not want to upset customers” after announcing it “would
 24 be available on Steam on a specific date.”).⁹ Competition abounds.

25 _____
 26 ⁹ Plaintiffs allege that competing platforms are “not options for many Developers because
 (a) they only host and sell their own games; (b) they only take high-profile games or games with

1 Second, for developers that choose to sell a game on Steam, the Complaint alleges no
 2 facts that any developer suffered harm from offering its game or an update on Steam at the same
 3 time as elsewhere. Dark Catt speculates that some developers could negotiate better terms by
 4 offering games or updates first to one store and then to another, ¶ 47, but alleges no facts that this
 5 timing provision has ever caused it harm. Rather, the facts alleged show developers do make
 6 exclusive deals with Valve’s competitors. No competitive harm is alleged.

7 c. The DLC Provision. This provision requires developers that sell a game on Steam and
 8 sell or give away DLC (downloadable content, which could be a cosmetic change or a new story
 9 or mission) for that game to give their customers who bought the game on Steam “comparable
 10 DLC” at the same time as customers who bought the game elsewhere. ¶¶ 50, 53.

11 The complaint vaguely alleges that “restrictions on DLC as well as other terms imposed
 12 on Developers are, in practice and effect a type of Most Favored Nations (“MFN”) provision
 13 preventing price competition between storefronts.” ¶ 54. These “restrictions on DLC” and
 14 “other terms” supposedly prevent developers from “monetize[ing] their DLC at a better rate on
 15 another store or use[ing] DLC exclusives to attract customers to another store.” *Id.* But no
 16 factual allegation backs up the claim that these provisions prevent price competition for DLC.

17 First, developers can make whatever deal they wish with another storefront to sell their
 18 DLC at any profit margin they can negotiate. For example, they could sell DLC through a Steam
 19 competitor that charges a lower commission—say Epic or Microsoft at 12%, *see* ¶¶ 140, 196—
 20 and pocket the savings over Valve’s 30% (25% or 20% for high-volume games).

21 Second, the DLC provision permits exclusive DLC elsewhere: the Developer [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 _____
 25 a proven sales record as a business strategy to draw gamers from Steam; or (c) they offer only
 26 DRM-free games, meaning Developers do not have any anti-piracy protections.” ¶ 123. Valve,
 by contrast, accepts virtually any game from any developer, which is why it offers 50,000 games.
See ¶ 81. If Valve’s competitors are less open to small developers like Dark Catt or fail to add
 value like anti-piracy protection, that is due to the competitive market, not Valve’s actions.

SDA

§ 2.4, Ex. A to Quackenbush Decl. DLC exclusives with Valve’s competitors are *explicitly allowed*, and Dark Catt alleges no instance of Valve thwarting one. No competitive harm here.

In sum, Dark Catt’s factual allegations do not allege injury to competition from any of the three provisions that supposedly combine to make an MFN. *See Nicolosi Distrib., Inc. v. FinishMaster, Inc.*, 2018 WL 4904918, at *5 (N.D. Cal. Oct. 9, 2018) (“Nicolosi must sufficiently allege an injury to competition by identifying a contract with some anticompetitive effect.”) (cleaned up); *see also Digene Corp. v. Third Wave Techs., Inc.*, 323 F. App’x 902, 912 (Fed. Cir. 2009) (finding no anticompetitive effect from a never-enforced termination clause).

E. Allegations of the Steam Review System Do Not Allege Injury to Competition.

Dark Catt claims Valve harms competition by allowing Steam users to post game reviews. ¶¶ 16, 19. Dark Catt admits they “are not posted by Valve itself,” ¶ 185, yet “must prove [that it suffered] antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes *defendants’* acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added)).

The Complaint implausibly attempts to transform customer reviews into anticompetitive conduct on Valve’s part. First, it alleges that Valve “does not timely remove [...] inappropriate reviews.” ¶ 168. But under the *facts* alleged, the antitrust laws impose no duty on Valve to remove reviews Dark Catt deems inappropriate. *See Qualcomm Inc.*, 969 F.3d at 993. The Complaint leaves one guessing what standard of censorship would satisfy Dark Catt or if it’s even feasible with 120 million monthly and 25 million peak concurrent Steam users. *See* ¶ 42.

Even if Valve had such a duty, the Complaint alleges that Valve voluntarily implemented a process in 2019 to identify “anomalous review activity” for internal review, and an article it quotes reports Valve adopted another to enable customers to easily view a game’s long-term trend of reviews and home in on any negative spike to judge it for themselves. ¶¶ 182–83 & n.7. According to the 2019 The Next Web [article](#) the Complaint quotes at ¶ 17 n.7 (viewed on

Aug. 30, 2021), “Steam has already attempted to curtail the effect of review bombing by implementing graphs, which let you chart whether reviews have been generally positive or negative over the game’s lifespan, and to jump straight to a spike of negative reviews to see the complaint behind it.” As the article explained, “[t]his allows you to judge for yourself how seriously you want to take the issue. It’s much the same as jumping straight to the one-star reviews on Amazon, only with more context.” *Id.* As the author concludes, “[s]hort of taking the nuclear option—removing reviews entirely—it’s hard to see what else platforms like Steam and Amazon could do to ameliorate review bombs.” *Id.* As the Supreme Court recently reaffirmed, “antitrust courts must give wide berth to business judgments before finding liability.” *N.C.A.A. v. Alston*, 141 S. Ct. 2141, 2163 (2021). Dark Catt’s beef with how Valve manages user reviews invites the Court, improperly, to become the arbiter of how Valve and many other companies do it, but it does not allege conduct that gives rise to antitrust liability.¹⁰

Second, the Complaint nebulously alleges that Valve “encourages and/or allows its users to improperly attack Developers using Steam reviews,” ¶ 168, but never alleges this happened to Dark Catt. As its “example,” the Complaint alleges that, “when Developers offer exclusives on other stores, Valve *may* use social media channels to notify its followers of the Developers’ action, resulting in an attack on the Developer.” ¶ 169 (emphasis added). The only factual allegation of what “may” happen is the release of the game Metro Exodus. *See* ¶ 172. Its developer pre-sold the game on Steam before releasing it, but then changed its mind and made a one-year exclusive deal with Epic, which meant gamers who had pre-purchased on Steam would have to wait a full year after release to play. *See* ¶¶ 172–73.

Dark Catt says that “Valve issued a statement criticizing the exclusive, calling it unfair to Steam customers.” ¶ 172. In fact, Valve criticized the developers pre-selling the game to Steam

¹⁰ Moreover, none of the Complaint’s factual allegations about customer reviews allege any loss in sales. *See* ¶ 164 (Shenmue 3), ¶¶ 172–75 (Metro Exodus), ¶ 176 (Borderlands 3), ¶ 177 (Ooblets), ¶ 186 (Darq). Thus, the Complaint does not even allege harm to competitors, let alone to competition. *See Brunswick Corp.*, 429 U.S. at 488 (“The antitrust laws, however, were enacted for ‘the protection of competition not competitors.’”).

1 customers before making the “decision to pledge their exclusivity to Epic’s offering.” Trusted
 2 Reviews [article](#) (cited at ¶ 172 n.39, viewed Aug. 30, 2021). Valve said, ““We think the decision
 3 to remove the game is unfair to Steam customers,” “[e]specially after a long pre-sale period.””
 4 *Id.* Again, Dark Catt improperly invites the Court to arbitrate how companies manage customer
 5 reviews and what Valve said online about this conduct, but alleges no injury to competition. *See*
 6 *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 624 (7th Cir. 2005) (Easterbrook, J.) (“What
 7 producers say about each others’ goods in an effort to sway consumers is competition in
 8 action.”).¹¹ Indeed, this allegation shows competition in action—the “continuing war between
 9 the Epic Game Store and Steam.” ¶ 172 n.39 (cited article).

10 Steam allows users to express themselves, allegedly by “a policy of not deleting
 11 reviews.” ¶ 182. Epic took the opposite tack, deciding to “cut game reviews entirely” on its
 12 competing platform. ¶ 17 n.7 (cited article). The Sherman Act, “the Magna Carta of free
 13 enterprise,” *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), does not empower the
 14 Court to decide whether online businesses should allow reviews or to regulate their management.

15 **F. Dark Catt’s CPA Claim Falls With Its Federal Antitrust Claims.**

16 Dark Catt bases its CPA claim, ¶¶ 233–40, entirely on its Sherman Act claims. “The
 17 [CPA] is modeled after federal antitrust statutes.” *Lubic v. Fid. Nat. Fin., Inc.*, 2009 WL
 18 2160777, at *5 (W.D. Wash. July 20, 2009). Courts routinely dismiss CPA claims along with
 19 federal antitrust claims. *See id.* (dismissing CPA claims for the same reasons as Sherman Act
 20 claims); *see also PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158, 1178–82 (W.D. Wash.
 21 2021) (same). This Court should too.

22 **IV. CONCLUSION**

23 Dark Catt fail to allege antitrust injury, market power, and unlawful conduct. Rather, it
 24 attacks a popular service consumers value in a competitive market. The Court should grant the
 25 motion and dismiss its claims, or stay them pending the *Wolfire* individual plaintiffs’ arbitration.

26 ¹¹ Although the Complaint alleges that “[v]ia its Steam review system, Valve is willing to ban games or Developers after little or no investigation of reported wrongful behavior,” ¶ 17, Dark Catt makes no factual allegation of any such ban.

1
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CERTIFICATE OF SERVICE

I certify that I am a secretary at the law firm of Fox Rothschild LLP in Seattle, Washington. I am a U.S. citizen over the age of eighteen years and not a party to the within cause. On the date shown below, I caused to be served a true and correct copy of the foregoing on counsel of record for all other parties to this action as indicated below:

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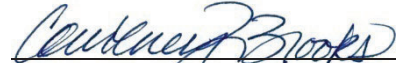
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1 I declare under penalty of perjury that the foregoing is true and correct.

2 EXECUTED this 30th day of August 2021, in Tacoma, Washington.

3
4 
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